

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CATHERINE DESTEFANO

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CIVIL ACTION

v.

HENRY MICHELL COMPANY, et al. :

NO. 99-CV-5501

MEMORANDUM

Padova, J.

April 5, 2000

Plaintiff Catherine DeStefano filed the instant action alleging that Defendant Henry Michell Company discriminated and retaliated against her on the basis of age, disability and gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.; and the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. Plaintiff also raises claims against Defendants Rick Michell, Bill Whalen, Lentz Cantor Kilgore & Massey, Ltd., and Andrew H. Dohan pursuant to the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. Before the Court is Defendants Lentz Cantor Kilgore & Massey, Ltd. ("Lentz Cantor") and Andrew H. Dohan's ("Dohan") Motion to Dismiss Counts X and XI. For the following reasons, the Court grants Defendants' Motion.

I. BACKGROUND

The Complaint alleges the following facts. Henry Michell Company ("Company") originally hired Catherine DeStefano ("DeStefano") in August of 1982 as a seed packer. Over the years, DeStefano rose through the ranks, attaining the position of Operational Manager of the Seed Department in August 1994. In November of 1994, DeStefano began interviewing for the position of Seed Department Manager. However, the next month, an old work-related injury flared up, forcing DeStefano to take sick leave until March, 1995. In May, 1995, the Company hired Bill Whalen ("Whalen") as Seed Department Manager, and John Bonin ("Bonin") as Operational Coordinator. At the time, DeStefano was over forty years old. Whalen was twenty-two, while Bonin was twenty-seven years old. The Company gave DeStefano the job of Production Coordinator, placing her under Whalen's supervision.¹

DeStefano claims that Whalen and Bonin made unwanted sexual and gender-based remarks creating a hostile work environment. Whalen also allegedly reprimanded DeStefano and altered her job title and duties after she filed an internal complaint about Whalen's harassment. Not only did the harassment allegedly cause her emotional and psychiatric suffering, but her new duties also aggravated her prior injury. As a result, DeStefano went on sick leave beginning February 6, 1996. On July 16, 1996, the Company's attorney, Andrew Dohan of the Lentz Cantor firm, sent a letter on

¹DeStefano alleges that Whalen was significantly less qualified for the job than she, and that Bonin was paid a higher salary for performing similar work.

the Company's behalf to DeStefano terminating her employment and restricting her disability coverage to one month following her termination ("Termination Letter"). Lentz Cantor and Dohan now move to dismiss Counts X and XI for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true.² Id.

III. DISCUSSION

Counts X and XI allege that Lentz Cantor and Dohan violated the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 955(e) (West 1999), by aiding and abetting the Company in retaliating against Plaintiff. Plaintiff alleges that the moving Defendants notified her of her termination in violation of the Company's policy, contained in the Company's Employee Handbook, which requires five days notice and disability coverage for three months following termination. Furthermore, Plaintiff claims that the moving Defendants' Termination Letter violated Rule 4.2 of

²For this reason, the Court will not consider any new material attached to Plaintiff's Brief in Response to Defendants' Motion.

the Pennsylvania Rules of Professional Conduct which prohibits attorneys from communicating with parties whom the attorney knows is represented by counsel. Additionally, Plaintiff alleges that the moving Defendants falsely claimed that Plaintiff failed to provide medical certification to justify her sick leave.

Section 955(e) of the PHRA states as follows:

It shall be an unlawful discriminatory practice, ...
(e) For any person, employer, employment agency or labor organization, or employee [sic] [sic] to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

43 Pa. Cons. Stat. Ann. § 955(e) (West 1999). The statute defines "person" as including "individuals, partnerships, associations, organizations, corporations, [or] legal representatives." 43 Pa. Cons. Stat. Ann. § 954(a) (West 1999).

The plain language of the statute clearly and unambiguously permits individuals to be held personally liable under the PHRA for retaliation or discrimination. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552-53 (3d Cir. 1996); Heimbach v. Lehigh Valley Plastics, Inc., No. CIV. A. 99-2979, 2000 WL 14871, at *2 (E.D.Pa. Jan. 7, 2000). Similarly, the statute expressly contemplates aiding and abetting liability for attorneys acting in their representative capacity by defining "person" to include "legal representatives." 43 Pa. Cons. Stat. Ann. § 954(a) (West

1999). For this reason, the Court concludes that section 955(e) liability could attach to the moving Defendants in their capacity as the Company's attorneys.

Plaintiffs normally use section 955(e) to hold supervisory employees liable for either their failure to attempt to remedy the discriminatory situation, Dici, 91 F.3d at 553, or their own direct acts of discrimination.³ Frye v. Robinson Alarm Co., Civ. A. No. 97-0603, 1998 WL 57519, at *4 (E.D.Pa. Feb. 11, 1998)(citing Glickstein v. Neshaminy School Dist., No. CIV. A. 96-6236, 1997 WL 66036, at *11-13 (E.D.Pa. Oct. 22, 1997)). Courts have distinguished between nonsupervisory and supervisory employees, and imposed liability only on the latter, on the theory that supervisory employees can share the discriminatory intent and purpose of the employer. Dici, 91 F.3d at 553; Frye, 1998 WL 57519, at *4. Requiring proof of intent to aid the employer under section 955(e) is consistent with the principles of aiding and abetting liability found in other areas of Pennsylvania law. See Commonwealth v. Chester, 587 A.2d 1367, 1384 (Pa. 1991); Commonwealth v. Flowers, 387 A.2d 1268, 1271 (Pa. 1978); Marks v. Bell Telephone Co. of Pa., 331 A.2d 424, 428 (Pa. 1975)(requiring aiders and abettors be active partners with the principal in the intent to commit a wrongful act). Based on the foregoing analysis, the Court predicts that the Pennsylvania

³Plaintiff does not cite, nor does the Court's independent research reveal, any cases in which section 955(e) was used to impose liability on an employer's attorney.

Supreme Court would not impose liability on an individual defendant under section 955(e) simply upon allegations that the defendant acted within the scope of an employment or agency relationship. Rather, the Pennsylvania Supreme Court would likely interpret section 955(e) to require allegations of scienter or a common purpose to retaliate shared between the individual defendant and the employer.

Plaintiff in this case alleges that moving Defendants performed acts that aided and abetting the Company's retaliatory behavior in their capacity as agents of the Company. (Compl. ¶¶ 11(b), 12(b), 80). The Complaint does not specifically allege that moving Defendants intended to aid the Company's discriminatory behavior, or shared some common purpose with the Company to retaliate. For this reason, the Court concludes that Plaintiff has failed to state a claim upon which relief may be granted under section 955(e) against moving Defendants and, therefore, grants Defendants' Motion. An appropriate Order follows.

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O R D E R

AND NOW, this day of April, 2000, upon consideration of Defendants' Motion to Dismiss Counts X and XI (Doc. No. 7), and Plaintiffs' Response thereto (Doc. No. 7), **IT IS HEREBY ORDERED** that Defendants' Motion is **GRANTED**. Counts X and XI are **DISMISSED**.

BY THE COURT:

John R. Padova, J.